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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS FLORES VALERA, Defendant and Appellant.	B177855 (Los Angeles County Super. Ct. No. BA251614)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ruffo Espinosa, Jr., Judge. Affirmed in part; reversed in part and remanded.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Robert F. Katz, Lawrence M. Daniels and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Carlos Flores Valera appeals from the judgment entered after a jury acquitted him of attempted murder (Pen. Code, §§ 664, 187, subd. (a)[1]; count 1) but found him guilty of the lesser included offense of attempted voluntary manslaughter (§§ 664, 192, subd. (a)) and of assault with a firearm (§ 245, subd. (a)(2); count 2). The jury also found true the allegations that defendant personally used a firearm during the commission of the attempted voluntary manslaughter (§ 12022.5, subd. (a)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)) during both offenses.

For defendant's crime of attempted voluntary manslaughter, the court sentenced him to state prison for 12 years and 6 months, consisting of the upper term of 5 years and 6 months, plus 4 years pursuant to section 12022.5, subdivision (a), and 3 years pursuant to section 12022.7, subdivision (a). The sentence and enhancement on the assault with a firearm count were stayed pursuant to section 654.

On appeal, defendant contends his conviction for attempted voluntary manslaughter must be reversed, in that the trial court's instruction on that lesser included crime relieved the prosecution of its burden of proving that he acted with the specific intent to kill. Inasmuch as we conclude that defendant's conviction for attempted voluntary manslaughter must be reversed due to instructional error, we need not and do not reach the merits of his contention that under *Blakely v. Washington* (2004) 542 U.S. 296 the trial court improperly imposed the upper term based on facts that neither were admitted by him nor found true by the jury.

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[1] All section references are to the Penal Code.

FACTS

Prosecution's Evidence

On August 6, 2003, Fernando Ceron Nieves (Ceron) and his family lived in an apartment in Montebello. Defendant lived in another apartment in the same building. That morning, Ceron did not offer to sell defendant any stolen property and had never before threatened to fight or kill defendant or any member of his family. In fact, the two men had never before spoken to one another.

Ceron was in the garage preparing to wash his wife's car when defendant approached and verbally abused and challenged Ceron. A heated argument between the two men erupted. When Ceron said he did not know what defendant was arguing about and did not know how defendant wanted to handle the matter, defendant swore at him and stated he would be back. Ceron considered defendant a madman and ignored him.

About five minutes later, defendant returned to the garage. Defendant approached Ceron from behind, angrily swore at him and simultaneously shot Ceron in his lower left flank. Ceron, who was unarmed, pleaded with defendant not to kill him. Defendant swore at Ceron again and fired his weapon two more times from a distance of three to six feet. The bullets struck Ceron under his left nipple and the left side of his waist.

Ceron threw himself on the gun and a struggle between the two men ensued. When Ceron gained possession of the gun, defendant became fearful and walked away. Ceron put the gun near the left rear tire of the car, fell to the ground and began to lose consciousness.

Within 10 minutes, officers from the Montebello Police Department responded to the scene of the shooting. Ceron, who was kneeling on the floor of the garage and bleeding profusely from his abdomen, told officers that defendant shot him but Ceron did not know why.

Officer Sean Hoffman detained defendant, Angelica Gonzalez (Gonzalez),[2] and defendant's stepson, Joseph Gonzalez (Joseph). All of them were yelling at one another as they approached Officer Hoffman and initially were uncooperative. Defendant had blood on his pants and T-shirt but appeared to be uninjured.

Joseph told Officer Hoffman that he awoke to the sound of gunshots. Joseph left his family's apartment and saw his mother, Gonzalez, and his sister standing at the rear of the apartment complex. They were screaming uncontrollably. Joseph rushed to his mother's side and saw defendant standing over Ceron and holding a .357 caliber revolver. Joseph grabbed defendant and took the gun away. Joseph then carried the gun to his apartment and hid it beneath a drawer in his bedroom.

Gonzalez told Officer James Egigian that she too was awakened by the sound of gunshots. Gonzalez ran outside but found no one. She then ran to the garage and saw defendant standing and holding a gun in his right hand. She saw Joseph take the gun and run back to their apartment.

A search of the garage by the police revealed no guns or knives. Joseph approached the officers and told them he had taken the gun and put it in his apartment. After obtaining a search warrant, the police searched defendant's apartment and recovered a .357 caliber handgun that contained six expended shells, as well as ammunition.

Ceron sustained two or three gunshot wounds to the abdomen and two gunshot wounds to his left leg. Paramedics transported Ceron to the hospital, where he underwent surgery for his injuries. He spent several weeks in the hospital in very critical condition. He spent two more weeks in another hospital where he received antibiotics and required a respirator. At the time of trial, Ceron continued to have difficulty breathing and other physical problems.

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[2] Officer Hoffman incorrectly described Gonzalez as defendant's wife. Defendant and Gonzalez are not married but, as Gonzalez testified in the defense portion of the case, they have lived together for "[a]bout 16 years."

Defense

Defendant's version of the events differed markedly from that of the prosecution. According to defendant, on the morning in question, Ceron approached and asked him if he wanted to buy a video camera. Defendant believed Ceron was trying to sell him stolen property and curtly declined. When defendant turned to enter his apartment, Ceron struck defendant in the ear and asked, "'Who do you think you are? You think you are too good or something?'" Ceron then pulled out a folding knife, snapped it open and threatened to hurt defendant and his son.

Defendant was afraid of Ceron and believed Ceron was on drugs. Defendant had seen Ceron use drugs before. Defendant had knowledge of a prior stabbing and shooting that took place at Ceron's former residence. Ceron previously had bragged about the people he had beaten up. According to defendant, everyone was afraid of Ceron. Ceron was "younger" and "stronger" than defendant, who then was 50 years old.

Defendant decided he had to "stop this." He went to his apartment and got his gun, which was loaded. The first three rounds were buckshot; the last three were bullets.[3] He told his daughter, "Goodbye. I've got to do what I got to do." Defendant's intent was to "[g]o down there and talk to this guy and just try to put a scare in him." Defendant "honestly didn't plan on having the gun go off." Defendant wanted Ceron to know, "just because I'm old, you are not going to walk over me." Defendant did not want to kill Ceron. Defendant just wanted to scare Ceron so Ceron would stay away from defendant and his family.

When defendant returned outside, Ceron was no longer in the yard. Defendant walked to the garage, holding the gun to his side. As soon as defendant entered the garage, Ceron advanced upon him. When Ceron reached for his knife, defendant

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[3] Defendant explained that he "always [has] buck shots." "The first three shots" are "BB's. [¶] They are warning shots" and although "they can hurt you" they "are not meant to . . . hurt you."

panicked and fired his gun. The shot did not seem to affect Ceron at all. Defendant believed Ceron was on something.

Ceron then grabbed defendant's gun and a struggle over the weapon ensued. Defendant, who had his finger on the trigger, thought Ceron was going to turn the gun on him and shoot him. Defendant did not see Ceron drop his knife and believed Ceron was holding the knife. During the struggle, the gun went off three or more times. Defendant "wasn't aiming" the gun. After the last shot, Ceron let go of the gun.

Joseph and Gonzalez, with whom defendant had lived for 16 years, were awakened by the sound of gunshots and the screams of other family members. When Joseph arrived in the garage, defendant was holding a gun. Defendant gave the gun to Joseph, who then took the gun to their apartment.

Gonzalez too went to the garage, where she saw Ceron holding his stomach and bleeding. Gonzalez also saw a folding knife on the floor about three feet from Ceron. Gonzalez kicked the knife away from Ceron and later saw a police officer carrying the knife away in a plastic bag.

DISCUSSION

Defendant contends that the trial court's instruction on attempted voluntary manslaughter permitted the jury to convict him of that lesser included offense without finding that he had the requisite intent to kill. We agree.

After the jury retired to deliberate, the trial court realized that it failed to instruct the jury on attempted voluntary manslaughter as a lesser included offense of attempted murder. The court read the pertinent instructions to the jury and then it permitted counsel to address the jury anew with respect to the newly given instructions.

The trial court instructed the jury that if it was not satisfied beyond a reasonable doubt that defendant was guilty of attempted murder, it could convict him of the lesser included crime of attempted voluntary manslaughter if convinced beyond a reasonable doubt that he committed the lesser crime. The attempted voluntary manslaughter

instruction was a modified version of CALJIC No. 8.40, the instruction on voluntary manslaughter. The instruction, as modified, provided: "Every person who unlawfully attempts to kill another human being without malice aforethought but either with an intent to kill, *or with conscious disregard for human life*, is guilty of attempted voluntary manslaughter in violation of Penal Code section 664/192, subdivision (a).

"There is no malice aforethought if the attempted killing occurred upon a sudden quarrel or heat of passion or in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury.

"*The phrase, 'conscious disregard for life,' as used in this instruction, means that the attempted killing results from the doing of an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life.*

"In order to prove this crime, each of the following elements must be proved: [¶] 1. An attempt was made to kill a human being. [¶] 2. The attempted killing was unlawful; and [¶] 3. The perpetrator of the attempted killing either intended to kill the alleged victim, *or acted in conscious disregard for life*; and [¶] 4. The perpetrator's conduct resulted in an attempt to kill a human being.

"An attempted killing is unlawful, if it was neither justifiable nor excusable." (Italics added.)

The court then explained when a sudden quarrel or heat of passion justified reducing "an unlawful attempted killing from attempted murder to attempted voluntary manslaughter." The court further instructed the jury regarding the actual but unreasonable belief in necessity to defendant one's self. With regard to the latter instruction, the court informed the jury that "[a] person who attempts to kill another person in actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, attempts to kill unlawfully but does not harbor malice aforethought and is not guilty of attempted murder.

The crime of voluntary manslaughter may be committed without the intent to kill. A defendant is guilty of voluntary manslaughter if he kills the victim with intent to kill *or* with conscious disregard for human life. (*People v. Lasko* (2000) 23 Cal.4th 101, 104; *People v. Blakeley* (2000) 23 Cal.4th 82, 91.) The same is not true for the crime of attempted voluntary manslaughter. That crime, like the crime of attempted murder, requires a specific intent to kill. (*People v. Montes* (2003) 112 Cal.App.4th 1543, 1549-1550; *People v. Gutierrez* (2003) 112 Cal.App.4th 704, 710.) The court's instruction, which informed the jury that it could convict defendant of attempted voluntary manslaughter if defendant acted in conscious disregard of human life, necessarily was erroneous. The question remaining is whether the trial court's instructional error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Flood* (1998) 18 Cal.4th 470, 502-504; *People v. Lee* (1987) 43 Cal.3d 666, 670-674; but see *People v. Montes*, *supra*, 112 Cal.App.4th at p. 1552 [applying standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836].)

Ceron's and defendant's versions of events prior to and during the shooting are quite divergent. While there is evidence from which the jury could have concluded that defendant intended to kill Ceron when he shot him, there also is evidence from which the jury could have concluded that defendant did not intend to kill Ceron but instead shot him in conscious disregard for human life. The evidence does not establish as a matter of law that defendant had the requisite intent to kill.

Based upon the record before us, we cannot hold that the trial court's instructional error was harmless beyond a reasonable doubt. Accordingly, defendant's conviction for attempted voluntary manslaughter cannot stand.

DISPOSITION

Defendant's conviction for assault with a firearm (count 2) is affirmed. Defendant's conviction for attempted voluntary manslaughter, a lesser included offense

of attempted murder (count 1), is reversed. The sentence is vacated and the matter is remanded for further proceedings.

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SPENCER, P. J.

We concur:

VOGEL, J.

MALLANO, J.